Office-Supreme Court, U.S.
FILED
NOV 30 1982
ALEXANDER L. STEVAS,
CLERK

82-1033

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

STATE OF OHIO,

Petitioner,

vs.

BERNARD H. WILMOTH,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER, THE SEIZURE OF EVIDENCE UNDER THE PLAIN VIEW DOCTRINE REQUIREMENT OF "INADVERTENCE" IS SATISFIED IF POLICE ARE WITHOUT PROBABLE CAUSE TO BELIEVE ADDITIONAL EVIDENCE SEIZED WOULD BE FOUND UNTIL THEY ACTUALLY OBSERVE IT IN THE COURSE OF ANOTHER LEGITIMATE INTRUSION.

II. WHETHER, FOR THE PURPOSE OF APPLYING THE PLAIN VIEW DOCTRINE TO JUSTIFY WARRANTLESS SEIZURE, THE REQUIREMENT OF "IMMEDIATELY APPARENT" MAY REASONABLY BE SATISFIED BY THE TOTALITY OF THE CIRCUMSTANCES INCLUDING OBSERVATIONS OF SEIZING OFFICER AND AN EXPERT ADVISOR AS TO VARIATIONS IN MOTOR VEHICLE PINSTRIPPING AND UNDERCOATING: BROKEN REAR WINDOW, LACK OF IGNITION, BENT AND LOOSE TO THE TOUCH "VIN" PLATES, CHANGED BOLTS; AND THE FRAME, CAB AND SEAT BELT HARNESS OF THE TRUCK BEING FOR A VEHICLE MANUFACTURED IN A DIFFERENT YEAR.

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OPINION AND JUDGMENT DELIVERED BELOW

The judgment entry and opinion of the Ohio Supreme Court from which this petition for a writ of certiorari is sought was delivered on the fourth day of August, 1982, and is fully set forth in petitioner's appendix.

GROUNDS UPON WHICH JURISDICTION OF THIS COURT IS INVOKED

The judgment of the Supreme Court of Ohio was entered on the fourth day of August, 1982. The jurisdiction of this court to review the final judgment and decision of the Supreme Court of Ohio pursuant to a petition for a writ of certiorari is invoked under 28 U.S.C. § 1257. In that: the Ohio Supreme Court has decided a federal question in a way that is in conflict with decisions of many federal circuit courts and with decisions of many state courts of last resort; and because the Supreme Court of Ohio has decided a question of federal constitutional law which has not been but should be decided by this Supreme Court.

CONSTITUTIONAL PROVISION WHICH THIS CASE INVOLVES

This case involves the Fourth Amendment of the Constitution of the United States:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be search and the persons or things to be seized."

SUMMARY OF ARGUMENT

The Petitioner, in each of its two questions presented for review, submits that the Supreme Court of the State of Ohio has interpreted and applied the plain view doctrine in a manner wholly inconsistent with that of the Federal Sixth Circuit Court of Appeals in its widely cited opinion of U.S. v. Hare, 589 F. 2d 1291 (6th Cir. 1979).

The Petitioner, in its first question presented, contends that the plain view element of "inadvertence" requires only that the law enforcement officers lack probable cause to include the additional seized items of evidence within the affidavit

for a previously obtained search warrant, even though the officers may have harbored a generalized suspicion that such additional evidence might be found in plain view during the process of executing the initial search warrant. This definition of "inadvertence" is consistent with the decision and reasoning of U.S. v. Hare, supra.

In its second question presented for review, the Petitioner, again contends that the plain view element requiring a "readily apparent incriminating nature" was met in the instant case consistent with the clear weight of federal case law. Nevertheless, the Ohio Supreme Court has rendered a decision in the present case which conflicts with federal case law.

In summary, the Petitioner submits that the decision of the Supreme Court of the State of Ohio interpreted federal decisional law in a manner inconsistent with that of its own federal Sixth Circuit Court of Appeals. Finally, the Petitioner submits that this case involves a substantial federal question.

STATEMENT OF THE CASE

A. FACTS MATERIAL TO QUESTIONS PRESENTED

This case concerns the seizure, on September 5, 1979, of two motor vehicles of which the Defendant, Bernard Wilmoth, claimed ownership. The motor vehicles, a red Ford Granada and a green and sand Ford pick-up truck were seized by City of Elyria, Ohio, police officers during a search conducted pursuant to a search warrant. The above motor vehicles were not listed in the search warrant. The justification contended by the State of Ohio for the warrantless seizure of these two vehicles is the "Plain View" doctrine exception of Coolidge v. New Hampshire, 403 U.S. 443, 91 S. Ct. (1971).

Specifically, the facts of this case are as follows:

On September 3, 1979, at approximately 1:00 a.m. Officer Cunningham entered onto premises known as Lucas Radiator, 718 Lowell Street, Elyria, Ohio, for purposes of making a routine security check. At that time, he observed, at the rear of the premises, a red pick-up truck without a bumper, grill, license plates or vehicle identification number. He was unable to

locate a vehicle identification number (hereinafter referred to as "VIN" or VIN plate") on the truck. (Transcript Suppression hearing, page 31-35, hereinafter referred to as "T.S."). Officer Cunningham left the area, and returned again on September 4, 1979, in the evening hours and inspected the red truck and again checked for "VIN" numbers (T.S. 39). On September 3, 1979, Officer Cunningham also examined other vehicles on the premises which he believed, for various reasons, to have been stolen, contraband property. Based upon his observations, Officer Cunningham obtained a search warrant for the premises and listed a total of six motor vehicles on the warrant. Officer Cunningham did not testify at the jury trial herein.

Cecil Lucas, owner of the premises known as Lucas Radiator, testified at the suppression hearing and at trial. Lucas operated a radiator shop on the premises and was renting out two bays on September 3, 1979 -- a center section to a Don Kendall and a rear section to a John Wilmoth (T.S. 5, 17). Lucas did not rent any portion of his premises to the Defendant, Bernard Wilmoth (T.S. 5, 15). The entire Lucas

Radiator shop occuppied approximately 6,800 square feet. (Transcript, Trial page 115 herein referred to as "T"). The rental agreement with both tenants was oral and month-to-month (T.S. 21). There was parking along the north, south and east sides of Lucas' building and the west side had another business establishment abutting it. (T. 119-120). Lowell Street runs east-west, adjacent along the parking lot on the south side of the Lucas Radiator Shop. There was no rental arrangements regarding parking and tenants and customers of all three buildings parked interchangeably on all three sides of 718 Lowell Street. (T.S. 20, 22, T. 120 - 121). Lucas also testified that "No Trespass" signs were not posted on the premises (T.S. 21). There was no agreement as to any exclusive use of the parking lot by either Kendall or John Wilmoth (T.S. 22). Lucas was aware that Elyria policemen entered onto his premises at night for security checks and Lucas had supplied the police with his home telephone number in case of emergency (T.S. 23-23), and the telephone number was updated every other year or so. (T.S. 23-24). The outer premises of Lucas Radiator

was not baracaded at night (T.S. 25).

On September 5, 1979, pursuant to a search warrant, City of Elyria police officers including Officers Cunningham and Curtis and William Lang of the National Auto Theft Bureau conducted a search of the 718 Lowell Street premises.

Present at the time of the search was the Defendant his brother John Wilmoth and Donald Kendall. Only Donald Kendall was served a copy of the search warrant. As a result of the search, the officers confiscated the subject 1979 Ford Granada 4-door vehicle and the 1979 Ford green and sand pick-up truck. Numerous other vehicles and auto frames were also seized.

William Lang, Special Agent with the National Auto Theft Bureau (hereinafter referred to as NATB), testified at trial on behalf of the State. Lang testified that he had previously worked as an FBI agent for 11 years and had nine years experience with the NATB. The NATB has been in existence since 1912. Lang testified that a function of the NATB is to assist law enforcement agencies in the identification of vehicles where the original manufacturer's

identity has been altered or obliterated. Lang also testified that he had attended numerous seminars and toured various auto assembly plants while in training and continues to do so presently in order to remain current on auto manufacture procedures. Lang also testified as to the purpose and significance of the Vehicle Identification Number (VIN) system and the placement of the VIN plates on vehicles by manufacturers. (T. 129-139).

In other words, Lang was an expert, qualified to determine whether the vehicles to be seized were legitimately constructed autos or were illegally rebuilt autos (as, in fact, they were).

Witness Lang testified that he was requested by the Elyria police officers to accompany them on the search. Agent Lang advised and assisted the police in examining and identifying the various vehicles including the two subject vehicles which were confiscated. (T. 178-179).

> A. ". . . Because I believe, based on my examination of the vehicles at that time, that they had stolen parts . . .
>
> . . .
>
> I advised the Police Department, and they made their decision." (T. 180).

Details of the events leading up to and including the seizure of the Ford Granada and the Ford pick-up are as follows:

At 8:00 a.m. on September 5, 1979, approximately three hours prior to the commencement of the search, Officer Curtis parked his marked police cruiser across the street from Lucas Radiator. At approximately 10:30 a.m., Curtis observed the Defendant drive onto the premises in the green and sand colored Ford pick-up truck (T. 186-187). Curtis saw the Defendant enter and then leave the center portion of the garage and put a red steering column in the back bed of the pick-up truck (T. 180). Curtis immediately radioed the police station as the the Defendant's actions. Almost immediately the Defendant again emerged from the building, looked across at Officer Curtis and removed the steering column and threw it alongside the building (T. 189). Shortly after this event, the search warrant was served. Curtis, upon entering the same center portion of the garage where he had just seen the Defendant saw and heard a police scanner radio tuned into and broadcasting on the same frequency band used by Curtis to radio the police station. (T. 223).

At this point, the search began. Inside the garage the officers discovered the 4-wheel drive truck frame described in the search warrant. (T.S. 131).

A 1979 Ford pick-up truck was found in two parts (T.S. 115). An improperly attached VIN plate fell off in the hands of Officer Curtis (T.S. 119). The truck's federal sticker had been removed. The sheet metal of the truck was new while the frame was rusted and belonged to an older truck. The paint on parts of the truck was different. (T.S. 119).

Parts of the 1977 Oldsmobile described in the warrant were seized from inside the garage, ie. two doors, a rear bumper, an engine, four wheels and four tires. The doors had no VIN plates on them. The engine had its serial number ground off (T.S. 120).

Next to be seized were the two four wheel drive truck frames described in the search warrant. (T.S. 130).

Also seized was a Z-28 Chevrolet Camaro (automobile) and a green Ford pick-up truck and numerous auto parts (T.S. 73).

The next object of interest was the green and sand colored Ford pick-up truck which the Defendant Wilmoth had driven onto the Lucas Radiator premises just before the search was to begin.

Agent Lang testified as to his observations of the 1979 Ford pick-up truck:

> ". . . The vehicle identification number plate with the F-14 number was not a factory installation in that the plate had been bent and the rivets appeared to have been tampered with. (T. 146).
> . . . In addition, in my examination of the vehicle, I noted that the Federal sticker, which would be located on the left doorjamb, on the cab, itself, was missing." (T. 147).
>
> "I further examined the vehicle for other numbers; namely, the Federal Sticker, which had been removed, scraped off." (T. 148).
>
> "Next, I went to the attaching bolts that hold the cab to the frame, the front end to the frame, and also the attaching bolts that hold the bed of the vehicle to the frame."
>
> . . .
>
> A. ". . . they (the bolts) had all been changed.
>
> . . .
>
> A. ". . . The bolts had been removed from one vehicle and placed on another." (T. 149) (Emphasis added).

Agent Lang also testified that the Defendant had stated to him during the inspection of the vehicle

that he had changed the cab of the truck. (T. 150).

Lang further testified that the Ford pick-up truck frame was that of a 1978 vehicle, and not a 1979 vehicle, ". . . as evidenced by the vehicle identification number stamped on it." (T. 156). Likewise, he testified that the seatbelt harnesses were from a 1979 vehicle not a 1978 vehicle. (T. 157).

Officer Curtis testified regarding the 1979 Ford pick-up truck as follows:

> "The truck . . . Mr. Bernard Wilmoth said it belonged directly to him. Upon checking the truck, that was found not to have a federal sticker. The VIN plate was insecure.
>
> Q. When you say "insecure" what do you mean?
>
> A. That it came off in your hands without being properly fastened." (T.S. 123).

Agent Lang further testified at trial as to his observations of the red 1979 Ford Granada, as follows:

> ". . . In examining the various vehicle identification numbers, I noted that there was no Federal Sticker on the left door.
>
> . . . In further examination, the vehicle was in the process of being put back together with parts from a different vehicle. I could tell this because the parts did not match. There were several things that would indicate to me that they didn't match because of things like pinstripping and under-coating. And the parts that were being reassembled all came off the same car which . . . was evidenced by things like pinstripping, the type of

undercoating that was consistent with the doors, the front end, and the deck lid.

From my experience and after having examined hundreds of cars, it was obvious that the vehicle was being rebuilt." (T. 141-142). (Emphasis added).

Lang further testified regarding the red subject Ford Granada,

"The vehicle was in a stripped condition at one time. By that, I mean, all the parts that I mentioned, the four doors, the front end, the deck lid, and the interior, and probably the tires and wheels, had been removed from this vehicle. And this vehicle was in the process of being rebuilt with other parts from another vehicle, a like and similar vehicle." (T. 142).

In addition, the Defendant stated to Agent Lang that he had in fact, "rebuilt" this particular auto. (T. 151).

Officer Curtis testified as to his observations of the Ford Granada, as follows:

". . . it was observed upon approaching that the rear small glass window, passenger's side was broken out.
Further observation, the body had several parts that had pinstripping on the rear quarter was lacking this pinstripping, other than the trunk lid having it on.

Further examination showed the vehicle's ignition had been removed from the steering column that was in the car. Upon checking the car closer, the VIN number was run through computer and was found to come back . . . Commerce Ford at Randall Road . . . it was

found that the Federal sticker on the vehicle was no longer in the place it would have been." (T. 191-192). (Emphasis added).

Curtis testified that instead of the Federal sticker properly being in the doorjamb, there was no federal sticker found. (T. 192).

Based upon the examination of Agent Lang, and Curtis' own examination together with the statements made by the Defendant regarding the pinstripping, the Elyria police officers made the decision to seize the Granada. (T. 193).

The Defendant, Bernard Wilmoth, together with John Wilmoth and Donald Kendall were arrested on September 5, 1979, at the conclusion of the search process (T.S. 142). The majority of the Ohio Supreme Court, in its opinion, incorrectly believed that the arrest of the Defendant occurred at some later date after the stolen vehicles had been identified by their true owners. State v. Wilmoth, 1 Ohio St. 3d 118, 438 NE 2d 105 (1982).

B. PROCEDURAL HISTORY OF CASE

The Defendant, Bernard H. Wilmoth, was indicted for numerous counts of Receiving Stolen Property in

in violation of Ohio Revised Code, § 2913.51, Fourth Degree Felonies.

The "plain view" doctrine exception to the warrant requirement of the Fourth Amendment ie. warrantless seizure of two motor vehicles, was initially raised in the trial court by way of consideration of Motion to Suppress. As to the two counts of Receiving Stolen Property, the suppression motion was overruled and the case proceeded to jury trial. On October 10, 1980, the Defendant was convicted of these two counts and was sentenced to a term of two to five years on each count, concurrently.

On July 1, 1981, the conviction was reversed by the Ninth Judicial District Court of Appeals, Lorain County, Ohio. The reversal was based upon the appellate court's interpretation of the requirement of the "plain view" doctrine.

On July 29, 1981, the State of Ohio appealed the appellate court's reversal to the Supreme Court of Ohio. Hearing was had before the Supreme Court of Ohio on March 16, 1982.

On August 5, 1982, the Supreme Court of Ohio, by a four to three decision, affirmed the appellate

court's reversal of the conviction.

It is from this decision of the Supreme Court of Ohio that Petitioner, State of Ohio, submits this Petition for a Writ of Certiorari.

ARGUMENT

I. THE SEIZURE OF EVIDENCE UNDER THE PLAIN VIEW DOCTRINE REQUIREMENT OF "INADVERTENCE" IS SATISFIED IF POLICE ARE WITHOUT PROBABLE CAUSE TO BELIEVE ADDITIONAL EVIDENCE SEIZED WOULD BE FOUND UNTIL THEY ACTUALLY OBSERVE IT IN THE COURSE OF ANOTHER LEGITIMATE INTRUSION.

The Ohio Supreme Court sustained the Court of Appeal's reversal of defendant Bernard Wilmoth's conviction and based its majority decision on its interpretation of the "plain view" doctrine pursuant to the holding in Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022 (1971).

Justice Stewart's plurality opinion in Coolidge, supra, set forth three requirements for a valid plain view seizure of evidence without a warrant: (1) the officer must have prior justification for the intrusion; (2) the incriminating nature of the evidence must be immediately apparent; (3) and the discovery of said evidence must be inadvertent.

This Supreme Court has authorized warrantless seizures of evidence under the plain view doctrine using the three criteria set forth above. Coolidge v. New Hampshire, supra, at 468-470, 91 S.Ct. 2022 at 2039 - 2040. However, the meaning subscribed to both the "inadvertent discovery" and the "immediately apparent" elements has not been explained with sufficient clarity to allow law enforcement officers to know and understand the precise scope of their search and seizure powers within the confines of the plain view doctrine.

In adressing the "inadvertence" element, this Supreme Court offered some guidance but the scope of an officer's powers in the plain view setting remain unclear. In Coolidge, supra, Justice Stewart, set forth the inadvertence element as follows:

> "The second limitation is that the discovery of the evidence in plain view must be inadvertent. The rationale of the exception to the warrant requirement, as just stated is that a plain view seizure will not turn an initially valid (and therefore limited) search into a general one, while the inconvenience of procuring a warrant to cover an inadvertent discovery is great. But where the discovery is anticipated, where the police know in advance the location of the evidence and intend to

> seize it, the situation is altogether different. The requirement of a warrant to seize imposes no inconvenience whatever or at least none which is constitutionally cognizable in a legal system that regards warrantless seizures as "per se unreasonable" in the absence of exigent circumstances". Coolidge v. New Hampshire, supra, 470-471 91 S.Ct. 2040. (emphasis sic).

In Coolidge, supra, this Court spoke primarily in terms of a totally warrantless seizure of evidence as permitted by the plain view doctrine. However, many times, as in the instant case, a police officer has already secured a search warrant that lists those items for which sufficient probable cause exists to believe that said items are present at the location therein described. The police officer may truly believe other incriminating evidence will be at the same location but he lacks sufficient probable cause to include those items in the warrant. In this instance, the plain view doctrine is applicable. In such a setting, the officer needs the heretofore unannounced guidance relative to the "inadvertence" element which this Supreme Court now has the opportunity to provide.

That is, this Supreme Court has yet to give any definite indication as to what degree of expectation

is required to make a discovery "inadvertent" other than that set forth in the above quoted passage in Coolidge, supra. Apparently, two theories have emerged in the lower federal courts.

The first theory is that a discovery will be "inadvertent" so long as the seizing officers lacked probable cause to believe that the evidence will be found, i.e. whether the officer "knows" before the seizure that the evidence will be found at the location. This theory has become the predominant view of the lower federal courts and has been applied by some state supreme courts as well. This theory will be referred to herein as the "less than probable cause theory".

The second theory which has evolved subsequent to Coolidge, supra, and the view that has been adopted by the majority of the Ohio Surpeme Court in the instant case, is that an "expectation" by the law enforcement officers, even though said officers lack probable cause to obtain a search warrant, operates to invalidate a plain view seizure because such an "expectation" is not inadvertent. This theory will be cited herein as the "expectation theory".

The "less than probable cause theory" has been adopted by a number of federal circuit courts including our own Sixth Circuit Court of Appeals. U.S. v. Liberti, 614 F. 2d 34 (2nd Cir. 1980); U.S. v. Ortega, 644 F. 2d 512 (5th Cir. 1981); U.S. v. Hare, 589 F. 2d 1291 (6th Cir. 1979); Mapp v. Warden, 531 F. 2d 1167 (7th Cir. 1976); cert. den., 429 U.S. 1982; U.S. v. Cutts, 535 F. 2d 1083 (8th Cir. 1976); U.S. v. Clark, 531 F. 2d 928 (8th Cir. 1976); U.S. v. Wysong, 528 F. 2d 345 (9th Cir. 1976).

Cited within the opinions of the above mentioned cases, are many other federal circuit and federal district court decisions wherein these courts have adhered to the "less than probable cause theory". The decision of U.S. v. Hare, supra, was relied upon by the State of Ohio in its argument to the Ohio Supreme Court.

The alternate view, the "expectation theory" was adopted by the Ohio Supreme Court in the instant case. A brief non-controlling comment relative to this view appeared in the dictum of U.S. v. Davis, 461 F. 2d 1026 (3rd Cir. 1972). The search there was ultimately upheld as being incident to the arrest.

However, the court stated that the evidence might not be admissible under the plain view doctrine because ". . . [t]he agents obviously believed the heroin would be there" and its discovery would not, therefore, be inadvertent, U.S. v. Davis, supra, at 1026, 1034-1035.

The Ohio Supreme Court's majority opinion relied exclusively upon its short-sighted interpretation of this Supreme Court's plain view doctrine in adopting the expectation theory and rejected the Sixth Circuit's less than probable cause theory of Hare, supra, as being:

> ". . . an expansive approach to the plain view doctrine in disregard of the admonitions of Coolidge, at page 466, that 'the plain view' doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges."
> State v. Wilmoth, supra, at 119; 438 NE 2d 105 at 106

The Ohio Supreme Court in its opinion, characterized the decision in Hare, supra, as being "illogical," ". . . exceedingly broad and for that reason questionable". Id. at 119; 438 NE 2d 105 at 106.

The Ohio Supreme Court, in rejecting the less than probable cause theory propounded by the Sixth Circuit in Hare, supra, stated in part that:

> ". . . this strained interpretation ignores the cautionary language in Coolidge and transforms a properly authorized and specific search warrant into an admission ticket that provides entry for the purpose of conducting a general search." State v. Wilmoth, supra, at 119, 438 NE 2d 105 at 106. (1982).

Thus, the Ohio Supreme Court's characterization of the properly authorized search pursuant to a valid warrant as an 'admission ticket' rejects the Sixth Circuit's plain view doctrine definition of inadvertence. Moreover, the Ohio Supreme Court has not, in interpreting Coolidge, relied upon adequate and independent state law grounds with respect to the instant case.

This petitioner relies upon the judicial reasoning of the Sixth Circuit in U.S. v. Hare, supra, and the less than probable cause theory propounded therein. The spirit of the Hare decision is applicable to the present case.

Briefly, the facts of Hare, are as follows:

Drug Enforcement Administration (DEA) agents suspected the defendant of narcotics violations. Bureau of Alcohol, Tobacco, and Firearms (ATF) agents also suspected the defendant of illegal transportation of firearms violations. Based upon reliable information, ATF agents obtained a search warrant to search defendant's premises for firearms, and related items. DEA agents, although not being included in the warrant, assisted the ATF agents on the search. Both illegal narcotics and weapons were seized. The government successfully argued to the Sixth Circuit that the plain view doctrine permitted the warrantless seizure of the drugs. The defendant there, like Defendant Wilmoth in the present case, claimed that the drug seizure was not "unexpected". Rather, the defendant argued that the drug seizure was planned, as evidenced by the DEA agent's presence during the search for illegal firearms.

The Sixth Circuit defined the plain view "inadvertence" requirement as page 1294 as follows:

> "We conclude, then, that 'inadvertence' in this context means that the police must be without probable cause to believe evidence would be discovered until they

> actually observe it in the course of an otherwise-justified search. There are many times when a police officer may 'expect' to find evidence in a particular place, and that expectation may range from a weak hunch to a strong suspicion. However, the Fourth Amendment prohibits either a warrant to issue or a search based on such an expectation. Yet if in the course of an intrusion wholly authorized by another legitimate purpose, that hunch or suspicion is confirmed by an actual observation, the police are in precisely the same position as if they were taken wholly by surprise by the discovery. The same exigent circumstances exist, and no warrant could have been obtained before the discovery."

In so holding, the Sixth Circuit also commented upon the limitations and harsh realities that would result from a definition of "inadvertence" as meaning unexpected - the definition which the Ohio Supreme Court now adheres to,

> ". . . If 'inadvertent' is interpreted as 'unexpected', an absured scenario would take place every time the police execute a search warrant on the premises of a person suspected of engaging in a variety of criminal activities, but when they have probable cause (and a warrant) to search for the fruits of only one crime. In such a case, whenever evidence of one of these other crimes turns up, even though it would have been impossible to obtain a warrant previously, someone must be sent to obtain a new warrant to authorize the seizure."

. . . . . .

> . . . We concluded that unless the police had the ability and opportunity to obtain a warrant prior to the seizure and failed to do so, the inadvertency requirement of the plain view doctrine has not been violated." U.S. v. Hare, supra, at 1295.

The Fifth Circuit, recently adhered to the "less than probable cause theory" of Hare and stated that:

> . . . It is true that the officers suspected all along that the appellants were shuttling marijuana. Consequently, discovery of the substance was not totally inadvertent in the general sense of the word. Yet 'inadvertence' has a different meaning as used in defining the plain view doctrine of valid warrantless seizures. Officers must be without probable cause to believe the evidence will be discovered, until the possibility of its discovery becomes corroborated by actual observations. If the suspicion is confirmed during the course of another legitimate intrusion, the officers are in the same position as if they were taken wholly by surprise . . ." U.S. v. Ortega, supra, at 515.

It is interesting to note that the majority Ohio Supreme Court also attempted to distinguish the Hare case from the present case:

> ". . . because the disputed evidence of narcotics in Hare was seized in connection with a search conducted pursuant to a warrant issued to uncover illegal firearms. In the instant case, however, the evidence at issue 'was the very thing being searched for'. State v. Wilmoth, supra, at 119, 438 NE 2d 105 at 106.

The Ohio Supreme Court's attempt to distinguish Hare is inconsistent with other courts' application of the less than probable cause theory. For instance, in U.S. v. Liberti, 614 F. 2d 34 (2nd Cir. 1980), the Second Circuit stated at page 37 therein that the 'inadvertence' requirement of the plain view doctrine was satisfied where, in a search pursuant to a warrant for named stolen cosmetics, additional cosmetics were validly seized since the officer did not "know" or have probable cause to believe that they would find additional cosmetics in plain view during the search.

The majority decision of the Ohio Supreme Court also runs contrary to supreme court decisions for the states of Alaska, Colorado, and Missouri. These states have adopted and applied the less than probable cause theory.

The Alaska Supreme Court in State v. Davenport 510 P. 2d 78 (1973), stated at page 87 that:

> "It seems to us unreasonable to deny the police the right to seize, simply because police had some idea they might find the material which they later discovered. Under a wide variety of situations, the police will lack probable cause sufficient to secure a warrant to search for items later discovered in the course of a search. . ."

Justice Erickson of the Supreme Court of Colorado, in People v. Stoppel, 637 P. 2d 384 (1981), also adopted the Hare less than probable cause theory and, writing for the Court stated at page 390 that:

> "While Coolidge did not specifically define the inadvertence requirement, a reasoned and thorough evaluation appears in United States v. Hare . . ."

The Missouri Supreme Court likewise agreed with the ". . . carefully analyzed. . ." definition of inadvertence set forth in U.S. v. Hare, supra. State v. Clark, 592 S.W. 2d 709, 715 (1980).

The State of Ohio submits that the less than probable cause theory as propounded in U.S. v. Hare, supra, is the most reasonable and sensible approach to the meaning of "inadvertence" requirement for the purposes of applying the plain view doctrine. The Sixth Circuit in Hare succinctly puts forth its rationale by stating that:

> ". . . It makes sense, however, if the fact is kept in mind that a warrant is normally required before a search can be conducted or a seizure effectuated, and if it is remembered that the only reason plain view seizures are permitted at all is because the intrusion which the Fourth Amendment seeks to guard against has already lawfully occurred, and the police are faced with a situation in which they observe evidence

> which they could not have obtained permission to seize, and which now is likely to disappear or be destroyed if they stop and leave to obtain a new warrant." U.S. v. Hare, supra, at 1295.

The Petitioner, State of Ohio, contends that the majority decision of the Ohio Supreme Court is contrary to the clear weight of authority relevant to the plain view inadvertence requirement. The Ohio Supreme Court's interpretation of Coolidge in applying the plain view inadvertence requirement absolutely conflicts with its own federal Sixth Circuit Court's interpretation as well as with those of the Second, Fifth, Eighth, Ninth, and Tenth Circuits.

Moreover, the Ohio Supreme Court's rejection of the less than probable cause view emasculates the plain view doctrine in instances where evidence of additional criminal activity is discovered during the process of executing a valid search warrant. The plain view doctrine as applied in Ohio is now essentially without force or effect as it relates to factual settings like those in the instant case.

The petitioner is in total agreement with the well reasoned and extensive dissenting opinion written by Ohio Supreme Court Justice Blanche Krupansky wherein

she discusses the practical effects of the majority opinion:

> "The majority's decision represents an unduly narrow interpretation of the plain view doctrine which needlessly shackles law enforcement officers in their efforts to conduct effective criminal investigations. The majority, by its holding in this case, mandates that even though police officers inadvertently discover incriminating evidence in plain view, if the evidence is not encompassed within a search warrant, the police must turn their backs, ignore a crime being prepetrated and risk losing the evidence. I would, therefore, reverse the judgment of the Court of Appeals." State v. Wilmoth, supra, at 124-125, 438 N.E. 2d 105 at 110.

Thus the State of Ohio contends that the majority decision of the Ohio Supreme Court, contrary to its claim that the less than probable cause theory ". . . would swallow the rule. . ." does nothing to further an individuals Fourth Amendment privacy interests. As stated by the Court in Hare, the only reason plain view seizures are permitted at all is because the intrusion which the Fourth Amendment seeks to guard against has already lawfully occurred. Instead, the Ohio Supreme Court majority has, through its decision, needlessly hampered the police by requiring them to stop during the course of a lawful search and leave to obtain yet another search warrant

thus enhancing the probability that the newly discovered evidence will either disappear or be destroyed.

The petitioner contends that this Supreme Court should reverse the four to three decision of the Ohio Supreme Court and define the requirement of "inadvertence" consistent with the decisions of the many federal circuit court's and the state supreme court decisions hereinbefore cited.

ARGUMENT

II. FOR THE PURPOSE OF APPLYING THE PLAIN VIEW DOCTRINE TO JUSTIFY WARRANTLESS SEIZURE, THE REQUIREMENT OF "IMMEDIATELY APPARENT" MAY REASONABLY BE SATISFIED BY THE TOTALITY OF THE CIRCUMSTANCES INCLUDING OBSERVATIONS OF SEIZING OFFICER AND AN EXPERT ADVISOR AS TO VARIATIONS IN MOTOR VEHICLE PINSTRIPPING AND UNDERCOATING; BROKEN REAR WINDOW, LACK OF IGNITION, BENT AND LOOSE TO THE TOUCH "VIN" PLATES, CHANGED BOLTS; AND THE FRAME CAB AND SEAT BELT HARNESS OF THE TRUCK BEING FOR A VEHICLE MANUFACTURED IN A DIFFERENT YEAR.

The majority of the Ohio Supreme Court also found that the seizure of the contraband vehicles failed to satisfy the "plain view" doctrine exception because the requirement of "immediately apparent" or in other words, the nexus between the items seized and criminal behavior, was not met. The majority of Ohio Supreme Court characterized the level of probable cause of

the officers to seize the two subject vehicles as nothing more than a "generalized suspicion". State v. Wilmoth, supra, at 120, 438 NE 2d 105 at 107.

Apparently, the many observations of the officers and Agent Lang were viewed by the majority of the Ohio Supreme Court as being of little significance. To summarize, the officers and Agent Lang had observed:

a). The Ford Granada vehicle had no Federal emission sticker, the pinstripping, and the undercoating did not match with the four doors, the front end and the deck lid; the parts being reassembled all came from a similar second vehicle and the Granada was in the process of being rebuilt; the rear glass window on the passenger side was broken out; and the vehicles ignition had been removed from the steering column; through computer check, the vehicle proved to be titled to Commerce Ford on Randall Road, Cleveland, Ohio, and not to the Defendant as he claimed.

b). Likewise, the 1979 green and sand Ford pick-up truck had a bent VIN plate number and appeared to have been tampered with; there was no Federal emission sticker on the truck; and the bolts

and rubber grommets holding the cab to the frame had all been transferred from another vehicle; and the VIN plate fell off into the hands of Officer Curtis.

The majority Ohio Supreme Court merely considered only one facet of the search process and from that one aspect concluded that the police had no more than a "generalized suspicion" that the autos were stolen,

> ". . . In its extensive recitation of the instant facts, appellant, unlike the court below, neglects to mention that "[t]he dashboard VIN's and license plates on both vehilcles [sic], which were in plain view, were checked out by computer and both came back as non-stolen." State v. Wilmoth, supra, at 120, 438 N.E. 2d 105 at 107.

What the Ohio Supreme Court majority neglected to consider, is that even though the subject vehicles were not reported as being stolen on the Elyria police computers, Officer Curtis had testified:

> ". . . All of a sudden, they couldn't show ownership in any of the vehicles in question we were finding. Nobody seemed to have titles to them; when we asked for them, they could not show ownership of them."

Certainly, the fact that neither the Defendant nor his confederates could produce proof of ownership, taken together with the many observations made by the officers, raised the level of probable cause of the officers to more than a mere "generalized suspicion".

Further, the majority Ohio Supreme Court in finding that the element of "immediately apparent" was not satisfied, placed much emphasis on what it felt was:

> ". . . [d]iscovery of evidence through such purposeful scrutiny . . . It would be stretching the meaning of 'plain view' to say that items which could only be seen by opening the doors and crawling underneath the cars was [sic] in plain view". State v. Wilmoth, supra, at 119, 438 N.E. 2d 105 at 106.

The "purposeful scrutiny" referred to by the majority was comprised of both Agent Lang's and Officer Curtis' outward visual observations of the vehicles, crawling on the parking lot ground beneath the pick-up truck, and opening of the auto and truck doors to check VIN plates. It should be remembered that the parking lot was accessible to and open to the public and that Defendant, Bernard Wilmoth, was merely a visitor on the premises.

Although the advice offered by Agent Lang was criticized by the majority of the Ohio Supreme Court as being " 'generalized suspicion' personified," his presence certainly falls within the ambit of the previous discussion of the "less than probable cause" theory. See State v. Wilmoth, supra, at 119, 438 N.E. 2d 105 at 106.

The "suspicion" of the Elyria police officers as to the existence of additional stolen autos, other than those listed in the search warrant, was confirmed during the course of the search by Agent Lang and Officer Curtis. See U.S. v. Ortega, supra at 515.

The State of Ohio contends that the Ohio Supreme Court's reasoning as to the element of immediately apparent is contrary to the holding of the "pre-Coolidge" Fifth Circuit case of United States v. Polk, 433 F. 2d 644 (1970), which held that inspection of a vehicle identification number by the opening of a door is not prohibited by the Fourth Amendment.

The Court in Polk at page 647 addressed "plain view" as follows:

> "A car is not a home. An automobile runs and stops on the public roads, where viewers may crawl under it or press their faces against its windows. Its exterior and much of its interior are within the 'plain view' of the casual or purposeful onlooker, and thus are not protected by the Fourth Amendment from searching eyes . . . " (Emphasis added).

The Court in Polk, at p. 647 - 648 also found that an auto owner has no expectation of privacy in his VIN plate.

"[4] Thus the VIN on the rear axle or on the car frame are outside any reasonable expectation of privacy. Those that may be seen only by opening the car door or hood are no more private: doors and hoods are continually opened to the eyes of observers. Although opening the door of a car may involve a technical trespass, such action does not invade any expectations of privacy". (Emphasis added).
See also, United States v. Johnson, 413 F. 2d 1396 (5th Circ. 1969).

Other federal circuit court decisions consistent with Polk, supra, and contrary to the majority Ohio Supreme Court opinion are: Cotton v. U.S. 371 F. 2d 385 at 392 (9th Cir. 1967); Pasterchick v. U.S. 400 F. 2d 696 at 700, (9th Cir. 1968); U.S. v. Ware, 457 F. 2d. 828, at 829, 830 (7th Cir. 1972).

The Fifth Circuit, in U.S. v. Wood, 500 F. 2d 681 at 682, 683 (1974), went so far to approve inspection of a VIN even though it might require such purposeful action as crawling underneath the vehicle and removing grease or dirt from the axle in order to read the identification numbers!

See also, U.S. v. Johnson 506 F. 2d 674 at 676, (8th Cir. 1974) regarding use of a flashlight to illuminate interior of darkened auto as falling within "plain view" doctrine.

Likewise, the State of Ohio contended to the Ohio Supreme Court that Defendant, Bernard Wilmoth, had no "expectation of privacy" when he permitted his two vehicles to be on parking lot premises of 718 Lowell Street, Elyria, Ohio: Rakas v. Illinois, 439 U.S. 128, 99 S.Ct. 421 (1978); United States v. Salvucci, 448 U.S. 83, 100 S.Ct. 2547 (1980); Rawlings v. Kentucky 448 U.S. 98, 100 S.Ct. 2556 (1980). Certainly, within the holdings of these cases, the Defendant had no expectation of privacy in the parking lot premises, which he neither owned nor rented -- even though he may have had a possessory interest in the two subject vehicles. As stated in Katz v. United States 389 U.S. 437, 88 S.Ct. 507 at 511 (1967).

> "What a person knowingly exposes to the public, even in his own home or office, is not subject of Fourth Amendment protection".

Finally, the State of Ohio contended to the Ohio Supreme Court that there was a nexus between the many vehicles and parts seized and the two subject vehicles seized and that this "nexus" supported the officer's conclusion that the incriminating nature of these two vehicles was "immediately apparent".

The nexus rule originated in Warden v. Hayden, 387 U.S. 294, 87 S.Ct. 1642 at 1650 (1967) as follows:

> "There must be . . . a nexus - automatically provided in the case of fruits, instrumentalities or contraband -- between the item seized and criminal behavior. Thus, in the case of "mere evidence" probable cause must be examined in terms of cause to believe that the evidence sought will aid in a particular apprehension or conviction".

This "nexus theory" was succinctly phrased by the Tenth Circuit in Seymour v. United States, 369 F. 2d 85, 826 - 827 (1966) in the following terms:

> "We know, of course, that the precise language of the Fourth Amendment requiring the search warrant to particularly describe "things to be seized" forbids "the seizure of one thing under a warrant describing another" - "nothing is to be left to the discretion of the officers executing the warrant." Marron v. United States, 275 U.S. 192 [48 S.Ct. 74 L.Ed. 231]; Stanford v. State of Texas, 379 U.S. 476 [85 S.Ct. 506, 13 L.Ed. 2d 431]; Harris v. United States, 10 Cir., 151 F. 2d 837, 169 A.L.R. 1413, affmd. 331 U.S. 145 [67 S.Ct. 1098, 91 L.Ed. 1399]. The constitutional mandate is implemented in Rule 41 (e), F.R. Crim. P. But, notwithstanding the specificity of the constitutional prohibition, the courts have apparently recognized a narrow exception dictated by the practicalities of a particular situation as where in the course of a lawful search pursuant to a lawful arrest or the execution of a valid search warrant the officer uncovers evidence of another crime. In these circumstances, the officer is not required to close his

eyes to the realities of the situation. He may seize the fruits or the instruments of the crime or even that which is presumptively contraband".

The nexus theory has been discussed with approval by other federal circuit courts:

United States v. Golay, 502 F. 2d 182, 185 (8th Circ. 1974); United States v. Carwell, 491 F. 2d 1334, 1335-1336, (8th Cir. 1974) Cert. denied 94 S.Ct. 3976; and United States v. Clark, 531 F. 2d 928 at 932 (8th Cir. 1976).

As stated by the Eighth Circuit Court in United States v. Jones, 452 F. 2d 884, 888 (1971), in considering a "nexus", the circumstances presented would have, ". . . reasonably alerted the police officers to the fact that [the defendant] may have been involved in some other illegal activity . . . ", the fruits of which were before the officers in that case.

In the present case, there was probable cause to establish that a nexus was provided between the two subject contraband vehicles seized and the criminal behavior of the defendant, ie.:

a. The seizure of the numerous other stolen vehicles and parts prior to the plain view discovery of the Ford Granada and Ford pick-up truck.

b. The suspicious actions of the defendant in removing the steering column from the rear bed of the Ford pick-up truck immediately following the interception of Officer Curtis' police radio broadcast on the defendant's police scanner.

c. The many outward observations of the officers as to the physical appearance of the Ford Granada and Ford pick-up truck.

d. The many obversations of the officers as to the condition of the VIN plates and underbed of the pick-up truck.

It is the reasonableness of the seizure under all of these circumstances which is relevant and not the reasonableness of the opportunity to obtain a search warrant after the observation was made. United States v. Rabinowitz, 339 U.S. 56, 70 S.Ct. 430 (1950).

In short, the totality of circumstances apparent to the officers gave them sufficient probable cause to seize the two subject vehicles. The State of Ohio contends that the officers were not required to ignore what was obvious to them:

> "The Fourth Amendment does not require a policeman who lacks the precise information necessary for probable cause to arrest simply to shrug his shoulders and allow a crime to occur or a criminal to escape". Adams v. Williams, 407 U.S. 143, 92 S.Ct. 1921, 1923. (1972).

As with the "inadvertency" requirement, this Supreme Court in Coolidge supra, did not define the "immediately apparent" requirement. Id. at 2038. Perhaps this was so because this requirement is intended to be determined according to the factual setting of each case. However, in the instant case, the State contends that if it was not "immediately apparent" to Agent Lang and the other officers, that they had contraband evidence before them ie., the two subject vehicles, then it is difficult to imagine when it will be apparent to law enforcement officers that they are dealing with contraband autos!

As stated by Mr. Justice White in his dissent in Coolidge, supra, 91 S.Ct. 2022 at 2065,

". . . Here the Court has a ready opportunity, one way or another, to bring clarity and certainty to a body of law that the lower courts and law enforcement officials often find confusing. . . "

The State of Ohio contends that under the totality of the facts and circumstances of this case, that this Supreme Court should reverse the four to three decision of the Ohio Supreme Court as to the requirements of "immediately apparent".

CONCLUSION

The State of Ohio submits that this United States Supreme Court should grant certiorari in this matter and define, once and for all, the requirement of "inadvertence" as it pertains to the "plain view" doctrine exception to the Fourth Amendment warrant requirement.

Likewise, this Supreme Court has the opportunity to clarify the "immediately apparent" requirement of the "plain view" doctrine exception.

The four to three split decision of the Ohio Supreme Court is indicative of the definitional conflict as to these "plain view" doctrine requirements. The majority decision of the Ohio Supreme Court is

contrary to the many federal circuit court decisions and to the three state supreme court decisions cited herein.

What the majority of the Ohio Supreme Court has done with its "unduly narrow interpretation" of the plain view doctrine is to hamper Ohio law enforcement officers conducting criminal investigations. The majority decision has severely crippled law enforcement in its battle against illegal auto theft and "chop shop" operations in Ohio.

For these reasons, the Petitioner respectfully requests that this United States Supreme Court grant certiorari.

Respectfully submitted,

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Prosecuting Attorney
Lorain County, Ohio

BY: Michael J. Scherach
Michael J. Scherach
Assistant Prosecuting Attorney

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Petition of Writ of Certiorari was mailed to the office of James R. Willies, Esq., Bond Court Building, Suite 1609, 1300 East Ninth Street, Cleveland, Ohio, 44114, this 16 day of December, 1982.

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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

STATE OF OHIO,

Petitioner,

vs.

BERNARD H. WILMOTH,

Respondent.

PETITIONER'S APPENDIX

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STATE v. WILMOTH.
Cite as 1 OBR 157 or 1 Ohio St.3d 118.

1 Ohio St. 3d 118.

THE STATE OF OHIO, APPELLANT, v.
WILMOTH, APPELLEE.

Criminal Law: search and seizure--
plain view doctrine not applicable
when "generalized suspicion".

(No.81-1334--Decided August 4, 1982.)

APPEAL from the Court of Appeals for Lorain County.

On September 5, 1979, the Elyria police obtained and executed a search warrant for a building that housed three auto repair businesses. John Wilmoth operated one of these auto repair shops. The warrant authorized a search for four named vehicles and certain auto parts. The police, who were accompanied by an expert from the National Automobile Theft Bureau, did not limit their search to the vehicles and parts named in the warrant. Instead, they proceeded to scrutinize all the vehicles on hand, including those in the parking lot and those parked outside. As a result of this extended search, two vehicles claimed to be owned by Bernard H. Wilmoth (appellee herein), John Wilmoth's brother, neither of which was identified in the warrant, were impounded and a subsequent investigation indicated that

the two vehicles had been rebuilt with stolen parts. Appellee was thereupon arrested and charged with receiving stolen property, in violation of R.C. 2913.51.

Appellee moved to suppress evidence obtained in the search. At a suppression hearing prior to trial the court agreed to suppress some of the evidence but refused to suppress the evidence associated with the two vehicles that were not identified in the warrant. After a jury trial appellee was convicted on two counts of receiving stolen property and sentenced to concurrent terms of two to five years.

Upon appeal, the Court of Appeals reversed the trial court and ordered a new trial. The court below based its reversal primarily on State v. Williams (1978), 55 Ohio St. 2d 82[9 O.O. 3d 81], which construed the "plain view" exception to the warrant requirement.

The cause is now before this court upon the allowance of a motion for leave to appeal.

Mr. Gregory A. White, prosecuting attorney, and Mr. Michael J. Scherach, for appellant.

Mr. James R. Willis, for appellee.

Per Curiam. In State v. Williams (1978), 55 Ohio St. 2d 82 [9 O.O. 3d 81], this court held in its syllabus:

"1. In order for evidence to be seized under the plain view exception to the search warrant requirement it must be shown that (1) the initial intrusion which afforded the authorities the plain view was lawful; (2) the discovery of the evidence was inadvertent; and (3) the incriminating nature of the evidence was immediately apparent to the seizing authorities.

[119] "2. Where a police officer, in the course of executing a search warrant, discovers automobile body parts not described in that warrant, and harbors no more than a generalized suspicion that such parts have been stolen, the incriminating nature of the parts cannot be said to be "immediately apparent,' and the seizure of the parts will not be upheld under the plain view doctrine."

The first paragraph of the syllabus in Williams restates the plain view test established by the United States Supreme Court in Coolidge v. New Hampshire (1971), 403 U.S. 443. The court below applied this three-part test to the instant facts and determined that the state failed to satisfy the second and third parts of the Coolidge test.

After noting that "every vehicle in the parking lot was systematically searched," the Court of Appeals con-

cluded that "[d]iscovery of evidence through such purposeful scrutiny cannot be termed inadvertent, especially when evidence of theft was the very thing being searched for. Although the vehicles themselves were in plain view, the specific evidence relied upon by the police in seizing the vehicles was not. It would be stretching the meaning of 'plain view' to say that items which could only be seen by opening the doors and crawling underneath the cars was [sic] in plain view."

The state would have us take an expansive approach to the plain view doctrine in disregard of the admonition in Coolidge, at page 466, that "the 'plain view' doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges." The fact that the police brought along an expert at least suggests that they intended a search more extensive than that authorized by the warrant. The expert was obviously not needed to inventory items clearly identified in the warrant. See Note, Criminal Procedure -- "Inadvertence"; The increasingly Vestigial Prong of the Plain View Doctrine, 10 Memp. St. L. Rev. 399, 408, at fn. 52 ("***to bring in 'trained eyes' for essentially no purpose other than to identify incrimina-

ting evidence circumvents the law and reinstates a general search warrant").

United States v. Hare (C.A. 6, 1979), 589 F.2d 1291, upon which appellant relies, is distinguishable from the case at bar because the disputed evidence of narcotics in Hare was seized in connection with a search conducted pursuant to a warrant issued to uncover illegal firearms. In the instant case, however, the evidence at issue "was the very thing being searched for." Moreover, in Hare the court acknowledged a certain illogic in its position, which illogic underpins appellant's argument herein. The Hare court candidly stated, at page 1295, that "it may seem illogical to hold that police who lawfully enter premises and discover evidence which is not described in their warrant, in the course of a properly limited search, may not seize it if they only thought they might find it, or if they discover it unexpectedly."

"Illogical" or not, appellant argues for the exceedingly broad, and for that reason questionable, definition of inadvertence enunciated in Hare. According to this test, anything that the police might discover while conducting [120] a search would be encountered inadvertently so long as the police did not have knowledge prior to the search

of what they would find. Presumably then, a warrant would not be required whenever the level of suspicion falls short of actual knowledge, the evidence is visable to the naked eye, and the initial entry is lawful. This strained interpretation ignores the cautionary language of Coolidge and transforms a properly authorized and specific search warrant into an admission ticket that provides entry for the purpose of conducting a general search.

Paragraph two of the syllabus in Williams held that a "generalized suspicion" will not support a warrantless seizure under the plain view doctrine. In case at bar, however, the police had nothing more to go on than a generalized suspicion. In its extensive recitation of the instant facts, appellant, unlike the court below, neglects to mention that "[t]he dashboard VIN's and license plates on both vehicles [sic], which were in plain view, were checked out by computer and both came back as non-stolen." Nevertheless, the search continued, with expert assistance, until it became "immediately apparent" (in the eyes of the expert) that the evidence was incriminating. The state simply over-

looks the implications of the expert's presence at the scene. This expert, in Williams terms, was "generalized suspicion" personified. The Court of Appeals in reviewing the record recognized as much and ruled accordingly.

In Williams, "we decline[d] to contort the plain view doctrine so as to justify the seizure *** under review, since we would thus be allowing this narrow exception to the warrant requirement to swallow the rule." Id. at page 86. We are equally disinclined to contort the plain view doctrine in the case at bar and therfore affirm the judgment below.

Judgment affirmed.

CELEBREEZE, C.J., W. BROWN, SWEENEY and C. BROWN, JJ., concur.

LOCHER, HOLMES and KRUPANSKY, JJ., dissent.

KRUPANSKY, J., dissenting. In my opinion, the majority's decision unnecessarily restricts the ability of police officers to conduct an effective criminal investigation. I must, therefore, respectfully dissent.

A full understanding of the circumstances surrounding the case sub judice requires the following complete presentation of the facts:

On September 3, 1979, Officer Derwood Cunningham of the Elyria Police Department entered the premises known as Lucas Radiator, 718 Lowell Street, Elyria, Ohio, for the purpose of making a routine security check. The owner of the premises, Cecil Lucas, ran a radiator shop and garage on the premises and rented out two portions -- one to a Don Kendall who ran an auto body business on the premises, and one to a John Wilmoth, appellee's brother, who also used the premises as an auto body shop. There were no rental arrangements regarding the parking areas on three sides of the premises, and [121] customers and tenants of all three businesses parked interchangeably on all three sides of the building. The premises were not barricaded at night, nor were there any "No Trespass" signs posted. Lucas testified he was aware the Elyria police officers entered his premises at night for security checks, and he had supplied the police with his home phone number in case of emergency.

In the early morning hours of September 3, 1979, Officer Cunningham observed several vehicles on the 718 Lowell Street premises which he believed to have been stolen. He returned again the next evening to check for

a vehicle identification number (VIN) on one of the vehicles. Officer Cunningham then obtained a search warrant for the premises, listing a total of four vehicles and two truck frames on the warrant. The 1979 red Ford Granada and 1979 green and sand Ford pick-up truck, which appellee claimed he owned, were not described in the warrant.

On September 5, 1979, pursuant to the search warrant, Elyria police officers conducted a search of the 718 Lowell Street premises. Assisting them was William F. Lang, Special Agent with the National Automobile Theft Bureau (NATB).

Appellee was present at the time of the search, having arrived on the premises earlier in the 1979 green and sand Ford pick-up truck, one of the vehicles involved in this case. Both the 1979 green and sand Ford pick-up truck and the 1979 red Ford Granada were in the parking area of the premises. Agent Lang's inspection of these two vehicles, which included upening the doors of the vehicles to check the VIN numbers and crawling under the vehicles, together with Officer William Curtis' own observations, gave the officers reasonable cause to believe the vehicles probably contained stolen parts. As

a result, the officers confiscated these two vehicles. Later investigation revealed they had both been rebuilt with stolen body parts.

Under the circumstances of this case, it is not at all surprising that before executing the search warrant, police officers had a generalized suspicion they might encounter other incriminating evidence. At that point, they already had probable cause to believe that the four vehicles and two truck frames which were named in the search warrant contained stolen parts. Thus, while they did not know in advance they would encounter other vehicles containing contraband, it was only natural for them to suspect the presence of criminal activity on the premises.

Their suspicions aroused, police officers enlisted the aid of an expert, William F. Lang, who had extensive experience and training in the detection of illegally rebuilt vehicles. Agent Lang had previously worked as an FBI agent for nearly 11 years and had nine years experience with the NATB. One of the functions of the NATB, which has been in existence since 1912, is to assist law enforcement agencies in the identification of vehicles when the original manufacturer's identity has been altered

or obliterated. Agent Lang has attended numerous seminars and toured various automobile assembly plants and continues to do so in order to remain current on automobile manufacture procedures.

[122] The majority characterizes Agent Lang as "'generalized suspicion' personified" and criticizes the police officers for availing themselves of the benefit of "trained eyes" for the purpose of identifying incriminatin evidence. In my view, however, the officers' decision to seek the assistance of an expert was sensible and prudent. The utilization by police officers of available resources, including the use of an expert who is capable of the identifying probable contraband, would seem to me to be a praiseworthy objective, not one deserving of criticism. The majority, however, discourages effeciency and takes the nonsensical approach of finding fault with police officers who have the foresight to arm themselves with an expert who knows stolen parts when he sees them.

According to the majority, the plain view doctrine is inapplicable in the instant case because the officers did not discover the evidence inadvertently. An explanation of the inadvertency requirement of the plain view

doctrine is set forth in United States v. Hare (C.A. 6, 1979), 589 F. 2d 1291, 1294, where it is stated: "*** [1]f, in the course of such a properly limited search the officer comes across other incriminating evidence, which he did not know he would find and thus did not intend to seize, its discovery is inadvertent." (Emphasis added.) Thus, the inadvertency requirement is satisfied if, prior to the search, the officers did not have probable cause to believe the evidence would be discovered. While perhaps appearing on the surface to be illogical, the rationale underlying this requirement is, if the officers had probable cause prior to the discovery of the evidence, there would be no justification for failure to obtain a search warrant before seizing the evidence.

The facts here indicate that although the officers may have suspected they would encounter evidence other than that listed on the warrant, their suspicion was not sufficient to amount to probable cause to believe the evidence would be discovered. The record indicates the 1979 green and sand Ford pick-up truck was not even on the premises at the time the warrant was obtained. Since the police did not know in advance that they would discover other incriminating evidence

and thus did not begin their search with an intention of seizing it, the evidence was inadvertently encountered in the course of an otherwise justified search. United States v. Hare, supra. Once the incriminating evidence was discovered, immediate seizure became necessary in view of the exigent circumstances, i.e., due to the mobility of the automobile there is a strong likelihood of the evidence disappearing if police had to return at a later time with a second warrant. See, e.g., Chambers v. Maroney (1970), 399 U.S. 42; Carroll v. United States (1925), 267 U.S. 132.

The majority concludes that discovery was not inadvertent because the incriminating nature of the evidence became apparent to the officers only after "purposeful scrutiny," i.e., only after Agent Lang opened the doors of the vehicles to check the VIN plates and looked under the vehicles. By assuming the officers' inspection of appellee's vehicles constituted a "search," the majority fails to recognize that the opening of a car door for the purpose of inspecting the VIN is not a search within the meaning of the Fourth Amend- [123] ment because the owner can have no reasonable expectation of privacy with respect to the car's VIN. United States v. Polk (C.A. 5, 1970), 433 F. 2d 644, 647. Similarly,

the owner can have no reasonable expectation of privacy with respect to those portions of the interior visible through the windows, nor as to the exterior of the car, including the underside. This is so since "[a] car is not a home. An automobile runs and stops on the public roads, where viewers may crawl under it or press their faces against its windows. Its exterior and much of its interior are within the 'plain view' of the casual or purposeful onlooker, and thus are not protected by the Fourth Amendment from Searching eyes." Id., 647. Appellee's Fourth Amendment rights were, therefore, not violated when Agent Lang opened the doors of the vehicles and looked at the undersides because the incriminating evidence observed by the officers was in plain view in and on appellee's vehicles which were parked on a public parking area.

The majority cites State v. Williams (1978), 55 Ohio St. 2d 82 [9 O.O. 3d 81], for the proposition that a warrantless seizure is not justified when police harbor

no more than a generalized suspicion that automobile parts have been stolen. The circumstances present in this case are, however, readily distinguishable from those present in Williams.

Unlike the officer in Williams, the officers here had the benefit of the judgment, experience and training of an expert. What is unremarkable in the view of the ordinary police officer may be immediately significant in the eyes of the trained expert.

In addition, there were numerous irregularities, not present in Williams, which led the officers to believe the vehicles contained probable stolen parts. These irregularities were observed on the exterior of the vehicles and on the interior when officers opened the doors to check the VIN plates, or were observable through the windows of the vehicles. As noted above, the officers' observation of these irregularities did not violate appellee's Fourth Amendment rights because (1) the opening of a car door to inspect the VIN plate is not a search within the meaning of the Fourth Amendment, and (2) there can be no expectation of privacy as to a car's exterior, nor as to those portions of the interior visible through the windows. United States v

Among the conspicuous discrepancies encountered, the record reveals the following with respect to the 1979 red Ford Granada: the federal pollution sticker was missing; the car was in the process of being rebuilt with parts from another vehicle of the same make as evidenced by several unmatched parts and mismatching of pinstriping and undercoating; the parts that were being reassembled all came from the same car as evidenced by things like the pinstriping and the type of undercoating which was consistent with the doors and front end; the vehicle was once in a stripped condition, i.e., the four doors, the front end, the deck lid, the interior and probably the tires and wheels had all been removed from the Granada and were in the process of being replaced with parts from another similar vehicle; the rear small glass window was broken out; and the vehicle's ignition had been removed from the steering column. The majority notes, the VIN on the red Granada was checked out by [124] computer as not stolen; it was, however, found to be titled to another party and not to appellee, as he claimed. Thus, although the vehicles were not reported

as stolen, as one of the officers testified: "***All of a sudden, they couldn't show ownership in any of the vehicles in question that we were finding. Nobody seemed to have titles to them; when we asked for them, they could not show ownership of them."

The evidence also included the following obvious irregularities with respect to the 1979 green and sand Ford pick-up truck: the VIN plate was not of factory installation; the VIN plate was bent and the rivets appeared to have been tampered with; the federal pollution sticker had been scraped off; the bolts attaching the cab, front end and bed to the frame had all been changed, i.e., had been removed from one vehicle and placed on the truck; the VIN indicated a 1979 vehicle, but the truck frame was that of a 1978 vehicle; the seatbelt harnesses were that of a 1979 vehicle, and not belonging to a 1978 vehicle; and the VIN plate was insecure.

Based upon the above observations and the totality of the circumstances, it was immediately evident to the expert the vehicles constituted evidence that a criminal offense had probably been committed. The crucial difference between the Williams case and the case sub judice

from a totality of the circumstances and the evidence in plain view there was certainly ample probable cause to determine these vehicles contained stolen parts. In Williams, the officer had only a generalized suspicion; whereas, in the case sub judice, the officers had probable cause.

It is, of course, well established that presence of probable cause along with exigent circumstances will support a warrantless seizure. The recent United States Supreme Court decision, United States v. Ross (June 1, 1982), _____ U.S. _____, 50 U.S.L.W. 4580, adds impetus to this position. Once probable cause exists, police may conduct a meaningful search without a warrant even into closed containers within an automobile. In Ross, the court reinforced the distinction between searches of fixed premises, such as houses or buildings, and searches of movable vehicles; because automobiles can be moved quickly, in some circumstances, "an immediate intrusion is necessary if police officers are to secure the illicit substance." Id. at 4583.

Under the circumstances of the case sub judice, the Fourth Amendment did not require that the officers ignore

patently incriminating evidence; rather, exigency necessitated the immediate seizure of vehicles which could have vanished easily if the officers had returned later with a warrant.

The seizure of the vehicles was justified under the plain view doctrine because: (1) the evidence was discovered during the course of executing a lawful search warrant; (2) the discovery of the vehicles was inadvertent; and (3) the incriminating nature of the evidence was immediately apparent.

The majority's decision represents an unduly narrow interpretation of the plain view doctrine which needlessly shackles law enforcement officers in [125] their efforts to conduct effective criminal investigations. The majority, by its holding in this case, mandates that even though police officers inadvertently discover incriminating evidence in plain view, if the evidence is not encompassed within a search warrant, the police must turn their backs, ignore a crime being perpetrated and risk losing the evidence. I would, therefore, reverse the judgment of the Court of Appeals.

LOCHER and HOLMES, JJ., concur in the foregoing dissenting opinion.

Office-Supreme Court, U.S.
FILED
1983 JAN 28
ALEXANDER L. STEVAS,
CLERK

NO. 82-1033

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

STATE OF OHIO,

Petitioner,

vs.

BERNARD H. WILMOTH

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a search warrant can be issued on the basis of an affidavit containing misrepresentations so serious that without which probable cause is not shown.

2. Assuming the validity of a search warrant for the seizure of certain described property, can the police seize other property not described in the warrant solely for the purpose of checking it out in the process keeping and retaining such property indefinitely (during the course of which further searches are repeatedly made) before it is determined (if it ever was) that certain parts of the truck were stolen.

3. Can the police on the basis of a search warrant seize property not specifically enumerated in the warrant as property to be seized, where such property

could not be said at the time of the seizure to be stolen property or contraband.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

No. 82-1033

STATE OF OHIO, PETITIONER

v.

BERNARD WILMOTH, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Ohio Supreme Court, reported as State v. Wilmoth, 1 Ohio St. 2d 118 (1982) and the opinion of the Ohio Court of Appeals are attached to the Petition.

JURISDICTION

The judgment of the Ohio Supreme Court having been entered and finalized

on August 4, 1982, makes it at once apparent that the petition for writ in this cause was not timely filed. This being so, this Court lacks jurisdiction to consider the petition -- or so it would seem. Rule 20.1, Rules of The Supreme Court, (1980 Revisions).

STATEMENT

The critical facts are aptly stated in the opinion by the Ohio Supreme Court. In a nutshell the police armed with a warrant that authorized the search of an auto repair shop for certain specific vehicles "proceeded to scrutinize all vehicles" on the premises "including some parked outside." During the course of their efforts two vehicles owned by respondent were seized although they were not identified in the warrant. Following their seizure, which was for the purpose of checking them out, appro-

ximately a month later certain parts were identified as having been stolen.

On appeal the intermidiate Court of Appeals reversed the conviction. This judgment, which turned on the trial court's erroneous denial of the Motion to Suppress, was affirmed by the Ohio Supreme Court in State v. Wilmoth, supra.

ARGUMENT

We rely on the opinions of the Ohio Supreme Court and the Ohio Court of Appeals to support our opinion that the trial court erroneously denied the Motion to Suppress. In our view, what counsel fails to recognize in assailing the opinions below is that "the 'plain view' doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at least emerges". Coolidge v. New Hampshire, 403 U.S. 443, 466 (1971).

Yet, this, of course, is precisely what happened here. For having actually found the property described in the warrant (a fact even the State concedes happened before the property in this case was seized), the officers, and their expert, arbitrarily extended their exploratory search to all other vehicles anywhere on the premises.

Even this is not all, it is certainly relevant here that the officers' reasons relevant here that the officers' reason for taking the so called expert along could not have been for his help in locating the property precisely described in the warrant. To be sure then, what is obvious from the fact of the expert's presence is that the officers fully expected to conduct, on their own authority, a general or exploratory search of these premises. It is this flagrant circumstance that activates an aspect of

Coolidge that is not easily understood, but must nonetheless be reckoned with. Here, we refer to the "inadvertant" discovery concept. In a nutshell, the point here is that if these officers had wanted to search for property other than that particularized in the warrant they should have submitted the information that caused them to enlist the aid of their expert to the court as a possible basis for a broader search. But, of course, that was not done because such information (if there was any) would not have been sufficient to justify the issuance of a warrant of authority. Also a warrant to search for possible stolen property would, in any event be deemed too general to pass muster.

I

Where A Search Warrant Affidavit Contains Serious Misrepresentations, The Question That Must Be Resolved Is Whether, Absent The Contributions Made By Such Misrepresentations, The Affidavit Sufficiently Supported The Issuance Of A Warrant For The Seizure Of The Property Described Therein.

At the outset, it should be understood the trial court was surely aware from the evidence produced at the motion hearing that the affiant had willfully misrepresented how he acquired the information set forth as the critical averments in his affidavit (SH 38-40; 47-62). Here we refer to the fact that the affiant wilfully concealed from the Court

posely trespassed, while off duty, onto the private premises here involved. And, he likewise concealed the fact of his crawling under certain vehicles parked thereon in search of information relative to certain numbers and other identification aspects thereof.

For our part, even the Ohio Court that wrongly decided State v. Dodson, 43 Ohio App. 2d 31 (1974), which actually condoned open perjury by an affiant en route to validating the search made therein, would draw the line against approving what occurred here. For at least in Dodson, the Court had to convince itself the officer's blatant perjury related to matters that did not defeat the presence of probable cause in the affidavit or render him unworthy of belief. Thus it was concluded, in that case, such perjury did not prevent them

from gospelizing the credibility of the affiant because he was a police officer. In any event, the conclusion was made in Dodson that since the affidavit contained probable cause, such was all that was required.

Here, of course, we have a deliberate failure by the affiant to reveal in his affidavit that it was necessary for him to commit a criminal offense (trespassing) in his quest for a sufficient basis to apply for the issuance of a warrant. Nor, did he mention actually being caught in the process of actually searching these vehicles (SH 47, et. seq.).

Again, in his affidavit, the affiant asserted that he was on patrol when his original observations were made. Hence, it cannot be denied that the officer misrepresented to the Court that his

knowledge, which supplied the factual substance in the affidavit, was acquired while he was on routine patrol. This is so because the facts verify he was off duty (SH 49) at the time.

For our part, had the trial court credited Franks v. Delaware, 438 U.S. 154 (1978), there is no way the warrant issued here should have survived meaningful scrutiny. In addition, and as further background for the arguments made below, the facts here show these officers were aware the property listed to be seized were the "two Ford automobiles, two Mercury automobiles, and a 4-wheel drive truck frame" (SH 62) that had been seen by the affiant on the premises before the warrant was sought.

II

Officers In Executing A Search Warrant For Particularly Described Motor Vehicles, Which Were In Fact Located And Seized, Are Not Authorized To Further Search And Actually Seize Property That The Officers Neither Knew, Nor Had Probable Cause To Believe, Was Seizable Property For The Express Purpose Of Checking It Out.

As the search warrant here shows, these officers were specifically authorized to seize certain specified vehicles that were appropriately identified. Hence, it must be conceded they were not authorized by the warrant to seize any other vehicles. Yet, other vehicles were not

only searched but seized as well.

Given the officer's testimony that they lacked any knowledge at the time of these other vehicles as to "which, if any, were stolen" (SH 73), and that none were identified as stolen when seized (SH 63); there is no way the State can ever show the presence of probable cause to believe they could properly be regarded as seizable property. Simply put, the State was required to show not only the presence of probable cause to believe any property searched or seized was, in the context of the case, stolen property but exigent circumstances as well.

It is the fact that no effort was made to show, and just as surely no determination made as to, the presence of any exigent circumstances justifying the warrantless seizure of the Granada. The Record also fails to show before its

seizure the presence of probable cause to believe the Granada or any of the Granada parts were, in fact, stolen property. Indeed, the evidence is to the contrary (SH 63). Even this is not all, the Ford Granada parts Bernard Wilmoth was convicted of receiving as stolen property were only identified as such on September 23, 1979 (R 59). This was nineteen (19) days after the seizure.

As to the Ford truck, which the jury determined contained parts of the stolen Perkin's truck (Count I); the facts again were that the truck was seized on September 5, 1979, the date the warrant was executed. The parts Bernard Wilmoth was convicted of possessing as stolen property were identified by Perkins as stolen property on September 19, 1979 (R 33).

Our position here, simply put, is that lacking probable cause to seize this vehicle (SH 62-63), any evidence developed as a consequence of the seizure must be regarded as fruit of the poisonous tree and for that reason alone should have been suppressed. Wong Sun v. United States, 371 U.S. 471 (1963). This conclusion is certainly augmented by the further searches that were likewise made in the hopes of identifying stolen parts or a stolen vehicle.

For our part, the critical fact here is the officer's candid statement that at "the time that the search had taken place, none of the vehicles were identified as being stolen" (SH 63). Translated, this means that even before these vehicles in this case were towed, the police had affirmative contra-indications to them being stolen. Yet

they were seized. Even more incredible, these seizures were validated by the trial judge.

Since the police lack the power to make warrantless seizures of private property for the purpose of checking it out, it has to be that a seizure admittedly made for that purpose cannot be squared with fundamental criteria.

III

Even Assuming The Police Have Probable Cause To Seize A Particular Motor Vehicle As Probable Stolen Property, A Warrant Is Nonetheless Required As A Condition Precedent To Conducting A Meticulous General Or Exploratory

Search Of Such Vehicle
In An Effort To Verify
Whether The Vehicle Or
Any Of Its Parts Were,
In Fact, Stolen.

It can hardly be denied that the examinations made of these vehicles while they were in police custody were unconstitutional searches. The principle purposes of these searches, indeed their sole purposes, were to obtain information pointing toward the conclusion that the vehicles were stolen or contained stolen parts.

Given these facts, showing the total absence of any justification for a warrantless search, if fundamental criteria had been observed, a warrant was required. See United States v. Chadwick, 433 U.S. 1, 13 (1977), and Preston v. United States, 376 U.S. 364,

367-368 (1964). The efficacy of our position in this regard is really beyond dispute.

As to the tenure or "period" used here by the police to check these vehicles out, all will agree the police cannot simply confiscate people's property with impunity. Nor, can they with impunity hold people's property indefinitely. In addition, it is no answer to simply remit persons victimized by unreasonable delays, and other inconvenience, caused by the police to legal remedies before the required determinations are made (--that is, to return the property, to retain it as evidence or to retain it as forfeiture property). Since any enforced deprivation of one's property offends due process unless justified, it necessarily follows that under the facts here, there can be no other conclusion

than the specific finding that the delays here were both inordinate and unreasonable and, for that reason, unconstitutional. Since it was developed (during a period when the vehicles were being illegally held by the police) that they contained stolen parts, it follows for this reason as well that these searches offended Wilmoth's constitutional rights.

CONCLUSION

What it is that the State fails to grasp in this case, indeed in most cases, is the fact that "history shows the police acting on their own cannot be trusted". United States v. McDonald, 335 U.S. 451 (1948). And, that it was because of this reason, perhaps more than any other, that the requirements of the fourth amendment had to be imposed on the States by Mapp v. Ohio, 367 U.S.

643 (1961). The fact that this occurred in an Ohio case, particularly a Cleveland Police case, is most significant.

In this cause, however, we are concerned with the conduct of the Elyria Ohio Police and whether (assuming their search warrant was indeed valid) they could also seize and search the property involved in this case.

As argued above "the [plain view] doctrine is [only] properly applied to situations in which a police officer is not searching for evidence against the accused but nonetheless inadvertantly comes across an incriminating object." United States v. Sedillo, 496 F.2d 151, 152 (9th Cir. 1974). And, even then a plain view seizure is limited to items that are clearly incriminating (-- that is, "immediately apparent") and that inadvertantly encountered in the course

of a justifiable instrusion.

While the State doubtless credits the efficacy of these tenets, unless our assessment of the State's argument is being misread, we are being told in one breath that Wilmoth had no expectation of privacy" in the vehicles involved (Petition, p. 36). And, in the next breath we are told that Wilmoth's lack of an expectation of privacy is a relevant consideration on any question as to whether the police "inadvertantly" discovered the subject vehicles. Aside from the fact that these particular contentions make no sense at all, for our part they are symptomatic of a penchant for wild assertions of this ilk that are being made all too frequently by prosecutors. The real tragedy in all this is that many truly believe some of this heresy they put in their Briefs.

The Ohio Supreme Court was absolutely correct in ruling that the seizures here cannot be validated under the plain view doctrine. However, the Court should have also held that the warrant itself should never have been issued, and that the searches made of the vehicles after they had been towed required a warrant.

For our part, the pervading, although unexpressed, rationale for the State's rambling and convoluted arguments seems to be that what these officers did was reasonable. Indeed, for years our courts have reasoned that the ultimate test is always reasonableness since the constitution only prohibits unreasonable searches not seizures. The problem with this position is not limited to the fact that there are Judges who never have, and never will, rule that a search or seizure is bad. The real problem relates

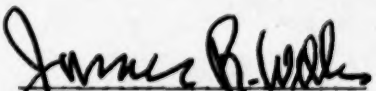
to the fact that our appellate Judges almost always rather automatically defer to the judgment of the trial Judges and the trial Judges defer to the police.

It is for this reason that the responsibility on this court is so grave. For if this court is unwilling to ratify appellate decisions like the one in this case, a good question would then exist as to when, if ever, another court will find the conduct of the police to be unreasonable -- the case here.

At least this much is certain, history also shows that any privilege to make a warrantless search or seizure that is sustained by this court will surely be interpreted and pushed to the limit by the police. This reason alone should add its weight to the opinions below and make affirmance even more highly desirable.

For all these reasons the Writ prayed for should be denied.

Respectfully submitted,



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